proves injurious to its citizens. A statute is valid which makes it unlawful for any person to manufacture, sell, or offer for sale, any butter or cheese or article designed to take the place of these articles, produced from any compound other than unadulterated milk or cream. Such a statute of a State is not a violation of the Fourteenth Amendment to the Federal Constitution, as it is entirely within the police power of the State to protect the public health. The question, whether the manufacture of oleomargarine is, or may be, conducted in such a way as to require the suspension of the business rather than its regulation, is one of fact and of public policy which belong to the legislative department to determine. If such legislation is unwise or unnecessarily oppressive, the remedy is an appeal to the Legislature or to the ballot-box, and not to the judiciary. The judiciary department must not give effect to statutory enactments plainly forbidden by the Constitution. A statute does not deny equal protection of the laws when the same penalties and burdens are imposed upon all persons engaged in the same business: *Powell* v. *Pennsylvania*, 127 U. S. 678.

D. H. PINGREY.

Bloomington, Ills.

RECENT AMERICAN DECISIONS.

Supreme Court of Tennessee.

BLOCK *v.* MERCHANTS' DESPATCH TRANSPORTATION CO.

A despatch company cannot by special contract exempt itself from liability for the loss or injury of goods which it has undertaken to carry, where such loss or injury is caused by the negligence of a railroad company it has engaged to transport the goods or by the negligence of the servants or employés of such railroad.

ERROR to the Circuit Court of Davidson County; FRANK T. REED, Judge.

Rice & Bell, for plaintiff in error.

Smith & Allison, for defendant in error.

CALDWELL, J. This action was brought in the Circuit Court of Davidson County by Block Bros. against the Mer-

chants' Despatch Transportation Company as a common carrier, to recover the value of a certain case of merchandise. Verdict and judgment were for the plaintiffs and the defendant has appealed in error. The goods were received by the defendant in the city of New York, under contract to deliver to the plaintiffs at Clarksville, Tennessee, for a stipulated sum. They were transported to Louisville, Kentucky, over several lines of railroad, in a car belonging to the defendant, and at that point they were delivered to the Louisville and Nashville Railroad Company for transportation to point of destination. The goods were never delivered at Clarksville, but were lost by the Louisville and Nashville Company in some manner, and at some time and place not shown. The shipment was made under the following receipt and bill of lading:—

NEW YORK, March 18, 1882.

"Rec'd from E. S. Jaffray & Co., in apparent good order, the following package marked as in the margin, viz: 282. Block Bros., Clarksville, Tenn., one case mdse. Bill of lading from New York to Clarksville, of first-class goods; 96 cts. per 100 lbs. To be forwarded to Clarksville under the following conditions: It being expressly understood and agreed that in consideration of issuing this true bill of lading and guaranteeing a through rate, the Merchants' Despatch Transportation Co. reserves the right to forward said goods by any railroad line between point of shipment and destination. * * * It is further stipulated and agreed that in case of any loss, detriment, or damage done or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefore, in whose actual custody the same may be at the happening thereof. * * *

[Signed.] McGEAGEN, Agent."

The contention of the defendant in the court below was that these stipulations in the bill of lading relieved it from liability for the loss of plaintiffs' goods; and the trial judge's charge with respect thereto is now assailed as erroneous. The Court charged that the latter of these stipulations was "ren-

dered void" by the former; that by the former, reserving to the defendant "the right to forward said goods by any railroad line between point of shipment and destination," the defendant made such railroad line its agents, and that "the law, on the grounds of public policy, would not allow it to stipulate exemption from liability for the consequences of the negligence of its agents, or their failure to do their duty." This instruction properly treats the defendant as a common carrier. The duties which it undertakes, and which it holds itself out to the public as willing to undertake and perform give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others, such has been assumed to be its character, without a discussion of the question. We cite a few of these cases: *Transportation Co.* v. *Cornforth*, 3 Colo. 280; s. c. 25 Amer. Rep. 757; *Robinson* v. *Transportation Co.*, 45 Iowa, 470; *Stewart* v. *Transportation Co.*, 47 Id. 229; *Wilde* v. *Transportation Co.*, Id. 247; *Bancroft* v. *Transportation Co.*, Id. 262; *Transportation Co.* v. *Bolles*, 80 Ill. 473; *Transportation Co.* v. *Leysor*, 89 Id. 43; *Transportation Co.* v. *Joesting*, Id. 152. The writers say that despatch companies are common carriers, and class them with express companies, because of the many points of similarity in their business, and the fact that they alike generally use the vehicles of others in the transportation of freight. No law is more familiar in England or America than that which binds the common carrier to safely deliver to the consignees, goods intrusted to it for transportation, unless prevented from so doing by the act of God or public enemy. But in the last half of a century, it has become equally well settled that the common law liability of a common carrier may be *limited in its extent*, by express contract for that purpose. This right of the carrier to limit its responsibility has been recognized by the Supreme Court of the United States, since the decision, by that court, in 1847, of the case of *Navigation Co.* v. *Bank*, 6 How. 344, and so far as we are informed, it is now upheld in every State in the Union. To be valid, however, the limitation must in all cases be reasonable; and to be reasonable, it must not stipulate for exemption from liability for the consequences of the negligence of the carrier, its servants,

or agents: *Railroad Co.* v. *Lockwood*, 84 U. S. 357–384; *Coward* v. *Railroad Co.*, 16 Lea, 225; *Dillard* v. *Railroad Co.*, 2 Id. 288; *Marr* v. *Telegraph Co.*, 85 Tenn. 529.

In the case before us, the defendant insists that by the stipulation in the bill of lading, it is relieved from responsibility for the loss of plaintiffs' goods. We have already seen that the defendant, in the bill of lading, first reserved to itself the right of selecting the particular line of railroad over which it should transport the goods, and left the shippers or owners no choice or discretion in that matter. This discretion, the trial judge told the jury, constituted such railroad lines, when selected, the agents of the defendant. Following this, is the other stipulation that *the company alone* upon whose line the goods might be lost or injured, should be liable therefor. This, the trial judge told the jury, was invalid, because it exempted the defendant from liability for the negligence of those agents. If the first of these two propositions laid down by the trial judge be true, the other would be sure to follow; that is to say, if the railroad lines over which the goods were transported, were the agents of the defendant, then its stipulation against its responsibility for the negligence of those agents, would be invalid. For it has been seen that a common carrier cannot lawfully contract against the consequences of its own negligence, and upon familiar principles, it can no more contract against the consequences of the negligence of its agents, because their negligence is, in law, its negligence.

The contract of shipment was made by the defendant, in its own behalf for the whole route, and not on behalf of others or for a part of the route only. For a specified sum, to be paid to it for the whole service, the defendant promised through transportation from New York to Clarksville, receiving the goods in its own name at point of shipment, and binding itself to deliver them at point of destination. It did not own or claim to own a single line of railroad, though several were to be used in the performance of its contract. It was compelled to rely upon others for the carriage of its freight, and, for its own benefit, and not for the benefit of the shippers, or consignees, it reserved to itself the selection of

the lines it would use; the reservation necessarily embracing the privilege on the part of the defendant making its own arrangements as to terms, with such lines and carrying with it the duty of paying them for their services. Such we regard as a proper interpretation of the bill of lading, down to and including the first stipulation. It shows the railroad lines engaged in the transportation of the goods sued for, to have acted for the defendant, and justifies the instruction that those lines were, in this litigation, to be treated as the agents of the defendant. The facts disclosed in the proof before the jury, are entirely in harmony with this interpretation of the bill of lading, and justify the conclusion of law. The goods were conveyed to Louisville in defendant's own car, and Louisville is, by one of defendant's witnesses, called the terminus of the line; but the manifest meaning of the witness, and the truth of the matter is, simply, that the defendant's car was transported to Louisville over railroad lines owned and operated by others with whom it had contracted, and that its car stopped at that point. At Louisville, the defendant engaged the Louisville and Nashville Railroad Company to convey the goods thence to their destination, to complete its contract for it. This engagement, as to others, the defendant made on its own behalf, upon its own responsibility, and in full recognition of its undertaking and duty to deliver the goods at Clarksville. The nature of this engagement, and its appreciation of the import of this duty, is best shown by the language of defendant's agent and witness. He says: "Defendant had to forward these goods as any other shipper, and it had to pay whatever the Louisville & Nashville Railroad Company would charge, even if it had been the entire amount received from the shippers."

Despatch companies and express companies have, since the earliest years of their existence, endeavored to put themselves without the rules applicable to common carriers, and to shield themselves against responsibility for the acts and omissions of other carriers, whose conveyances they habitually use in the performance of their own contracts. Their efforts in this direction have been uniformly unsuccessful, because regarded by the Courts as contrary to public policy. "It has been

attempted," says Mr. Lawson, "on the part of express, forwarding, and despatch companies to evade the responsibility of common carriers, on the ground that they are not the owners of the vehicles employed in the transportation; but this pretence has not been permitted in the Courts. The names which they assume are regarded as immaterial; the duties which they undertake being the criterion of their liability. They are, therefore, held to the responsibility of common carriers, both when they are and when they are not interested in the conveyances by which the goods are transported. If an express company engaged to transport goods, sends them by a railroad company employed by it to perform the service, the railroad company becomes the agent of the express company, and the latter is liable to the consignor for its acts:" Lawson, Cont. § 233. Mr. Hutchinson, speaking on the same subject, says: "Because of this peculiarity in the employment of the means of conveyance afforded by others, the contention has been made by these companies that they were not common carriers, but transacted their business in the character of forwarders, and were not therefore liable for losses occurring from the negligence of those whom they thus employed. But this claim to exemption from the ordinary liabilities of common carriers has not been sustained by the Courts. Those subsidiary means of transportation have been held to be the mere agencies employed by such companies, for whose acts they are strictly responsible; and the carrier whose vehicle is thus used becomes likewise liable, upon principles of agency, to the owner of the goods, according to the terms of his contract with his employer:" Hutch. Carr. § 70. The latter author, in the language just quoted, has reference to express companies; but in the second section following he says the same rules are applicable to despatch companies, in the same manner and for the same reasons. Then he says: "Other carriers, under the name of despatch companies, fast freight lines, and the like, have also come into existence, and conduct their business upon the same principle as express companies, that is, by the employment of the means of transportation furnished them by others, and to which for some reasons the same rigid rule of responsibility

as common carriers is applied:" Hutch. Carr. § 72. One of the earlier leading cases on this subject was decided by the Supreme Court of Massachusetts in 1867. The defendants there were express companies. Chief Justice BIGELOW, in delivering the opinion of the Court, said: "But it is urged in behalf of the defendants, that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers, over railroad and by steamboat, cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them, nor subject to their direction or supervision; and that the rules of the common law, regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles, and to exercise a personal care and oversight of them, are wholly inapplicable to the contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignee of goods delivered to a carrier for transportation, necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination, unless the fulfilment of their undertaking is prevented by the act of God, or the public enemy. This, indeed, is the whole contract, whether the goods are to be carried by land or water, by the carrier himself, or by

agents employed by him. The contract does not imply a personal trust which can be executed only by the contracting party himself, or, under his supervision, by agents and means of transportation directly and absolutely within his control. * * * The truth is that the particular mode or agency by which the services are to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him:" *Buckland* v. *Express Co.*, 97 Mass. 126–130.

Some ten years later Justice STRONG delivered a very instructive opinion on the same general subject. He said: "The exception or restriction to the common-law liability introduced into the bills of lading by the defendants, so far as it is necessary to consider it, is that the express companies are not liable in any manner, or to any extent, for any loss or damage or detention of such package or its contents, or any portion thereof, occasioned by fire. The language is very broad; but it must be construed reasonably, and, if possible, consistently with the law. If construed literally, the exception extends to all loss by fire, no matter how occasioned—whether occurring accidentally, or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful acts of the carriers themselves. That it can be operative to such an extent is not claimed. Nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct, or that of their servants and agents. But the Circuit Court ruled the exception did extend to negligence beyond the carrier's own line, and that of the servants and agents appointed by them and under their control—that it extended to losses by fire resulting from carelessness of a railroad company employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was that the railroad company and its employés were not under the control of the defendants. With this ruling we are unable to

concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody—either of the express company, or of the shippers or consignors of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employés. It is true, the defendants had also no control over the company or its servants, but they were its employés; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service, and by his direction. Moreover, a common carrier who undertakes for himself, to perform an entire service, has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate to him, and not to one who neither employs it, nor pays it, nor has any right to interefere with it. If, then, the Louisville and Nashville Railroad Company was acting for these defendants, and performing a service for them when transporting the packages they had undertaken to convey, as we think must be conceded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Co.* v. *Lockwood*, 84 U. S. 357. The foundation of the rule is, that it tends to the greater security of the consignors, who always deal with such carriers at disadvantage. It tends to induce greater care and watchfulness in those to whom the owner intrusts his goods, and by whom alone the needful care

can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed, extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriers more unreliable. This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case, he may have no actual control. Theoretically he has; but most frequently when the negligence of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be. For these reasons we think it not advisable to construe the exceptions in the defendants' bill of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed :" *Bank* v. *Express Co.*, 93 U. S. 181–183.

This latter decision, which we regard eminently sound in reason and in law, lays down the doctrine that controls the case before us. There the undertaking of the express companies was to carry certain money from New Orleans, Louisiana, to Louisville, Kentucky, and deliver it to a certain broker in the latter city. The express messenger placed the packages of money in an iron safe, and the latter in the express car, for transportation to destination. Thus situated, the money was transported over different lines of railroad, and while being carried over the Louisville and Nashville Company's line, a trestle gave way, in the night-time, precipitating the express car, which was then burned, together with the money. The express messenger, who accompanied the money, was rendered insensible by the fall and continued

so until the destruction was complete. Thereafter the broker sued the express companies in the United States Circuit Court, for the loss of the money. To these suits, the express companies interposed the stipulation against liability for the loss caused by fire, contained in their bills of lading, as a complete defence. The Court charged the jury that such stipulation relieved the defendants from the loss, if they and their messenger were without fault or neglect; and further, that it was not material to inquire whether or not the accident resulted from the negligence of the railroad company and its agents. In other words, the instruction was, that the defendants were liable for the consequences of their own negligence only, and not for a loss brought about by the negligence of the railroad company. That instruction was disapproved, and the contrary doctrine announced in the language we have quoted somewhat at length. There, the contract was for through transportation, in which the defendants were obliged to use the vehicles and railroad lines of others; so it is here. There, the defendants made their own employment of the railroad companies, and paid them for their services; so it is here. There, the defendants produced a special contract, and by reason of it claimed that they were not liable for a loss proceeding from the negligence of the railroad company; and so it is in the case before us. There, the railroad company was held to be the agent of the defendants, and for the consequences of its negligence they were adjudged to be liable. We so hold and adjudge here. A similar question was made before the Supreme Court of Illinois in 1879. Goods intrusted to an express company for transportation were destroyed by fire, while in transit upon a railroad. The Court said: "But admitting the conditions in the receipt were understandingly assented to by the shippers, and became a binding contract between the parties, still defendants would be liable for the full value of the goods, if the loss was owing to the negligence on the part of the railroad company. An express company, choosing such a corporation to do its business, will be chargeable to the same extent for the negligence of the agent employed, as if the contract was primarily with such agent, on the well-recognized principle that for culpable

defects in carriages used by common carriers, the law makes the carrier responsible:" *Boscowitz* v. *Express Co.*, 93 Ill. 523; s. c. 34 Amer. Rep. 197. To the same effect is *Christenson* v. *Express Co.*, 15 Minn. 270 (Gil. 208). See, also, *Transportation Co.* v. *Oil Co.*, 63 Pa. St. 14.

It is to be observed that all these decisions, from which we have made quotations, were made in cases against express companies, whose messengers accompany their freight, and not in cases against despatch companies, which have no such messenger; but the doctrine therein announced, as we understand it, is not made to depend, in any sense, upon the presence of the messenger. The holding is, that the express company is responsible for the negligence of the other carrier upon whose line the loss or damage may occur, not because the messenger is with the goods at the time, but because the other carrier is the agent of the express company. Express companies and despatch companies alike use the conveyances of others in the performance of their respective contracts with their respective customers; and they have precisely the same relation to those whose conveyances they so use. It is in this view that we regard those decisions applicable in this case; and it is for this reason just stated, that the text writers class express companies and despatch companies together. This is not like the case of a shipment over several connecting lines of railroad, when the company first receiving the goods, makes the contract for itself and others, and stipulates that liability shall fall alone upon the particular line in whose custody the goods may be when the loss, if any, may be suffered. There, the company first receiving the goods is in fact and by the contract, a common carrier for only a part of the route, to the end of its own line. Here, the defendant is in fact and by the contract, a common carrier for the whole route, from point of shipment to destination. There, that company limits itself to the faithful performance of duty as a common carrier, only while the goods may remain upon its line and until delivered to the one next succeeding. To that extent, and for that distance, but no further, does it hold itself out to the consignor as a common carrier. For the balance of the route, it acts only as agent of the other lines. Here, the defendant

holds itself out to the consignor as a common carrier for the whole route, and in its own name, and for itself, as principal and not as agent of any one, contracts to furnish the necessary means of transportation upon every part of the entire journey. The duty of transportation is divided into several parts, and each company stands as an independent carrier, bound only for safe carriage over its own line, and prompt delivery to the next in succession, or to the consignees; but it is released from liability only while the goods may be in custody of other lines. Here, the defendant undertakes the whole transportation upon its own responsibility; and, owning no railroad itself for any part of the route, it employs such lines of others as it sees fit to use. In making the contract with the consignors, it acts for itself alone; and in making the necessary sub-contracts with such railroad lines as it chooses to employ for assistance in the performance of its undertaking with the consignor, it again acts for itself, and no one else. And though it thus assumes for itself the duty of through transportation, and selects its own agencies, it nevertheless attempts to exempt itself absolutely from all accountability for any loss that may occur during any part of the entire transit.

There, the company first receiving the goods and making the contract for itself and other companies, leaves each answerable, under the law, for any loss upon its own line, the same as if no special contract were made; and stipulates only for exemption from liability for loss upon other lines—a liability which it could not in any event be compelled to assume against its will. Here, the defendant leaves itself accountable for no loss whatever which may happen on any part of the journey; but, by throwing the whole burden upon the railroad lines, its agents, it seeks to relieve itself absolutely from even a possibility of responsibility, on its own part, for any loss on any line. If loss be occasioned upon the first line, or upon the last line, or upon any intermediate line, the result is the same to the defendant; it has positive exemption from accountability in each and every instance, if its stipulation be sustained. It assumes the duty and receives the compensation of a common carrier, but tries to throw off all responsibility attaching to that relation and character.

There, the contract is reasonable, and therefore lawful; here, it is unreasonable, and therefore unlawful.

Manifestly no one of several connecting lines of railroad would be permitted to contract against accountability for a loss upon its own line; and for the same obvious reasons this defendant, which makes such lines its agents and its own for the purposes of this transportation as between it and the owner of the goods, should not be allowed to protect itself behind the stipulation presented in this case; otherwise all common carriers, in the law, which use the conveyances of others in the transportation of their freight and performance of their contracts with their customers, may, by agreement, completely annihilate their common-carrier liability, and revolutionize the wholesome rule of law hitherto prevailing upon that subject.

Owing to the vast scope and importance of the subject, the Courts and text writers have devoted much time and space to the discussion of the power and right of connecting railroad companies to limit and extend their common-law liability as common carriers within and beyond the *termini* of their respective lines. All authorities are now agreed, we believe, in holding that the first of a number of successive companies rendering service in the carriage of freight between distant points, may so bind itself to deliver goods beyond the terminus of its own line, as to become responsible for their safe carriage through the entire journey. But with respect to what is necessary to constitute such a contract, the English and American authorities are quite inharmonious. The English rule is that the receipt of goods marked for a given point without a positive limitation of responsibility, affords *prima facie* evidence of an undertaking on the part of the carrier to safely transport them to their destination, whether within or beyond the limits of its own line; while in America, most of the Courts regard each company as liable in the common-carrier capacity, only for the extent of its own line, unless there be a special contract to the contrary. The latter may be stated to be the American rule, though some of the States, Tennessee among the number, have adopted the English rule as more consonant with sound reason and public policy:

Schouler, Bailm. (ed. 1887) §§ 593–598, inclusive; Lawson, Cont. §§ 235–240, inclusive; Redf. Carr. §§ 190–197; Hutch. Carr. §§ 145–149, 151, 152; *Railroad Co.* v. *Campbell*, 7 Heisk. 253; *Railroad Co.* v. *Rogers*, 6 Id. 143; *Railroad Co.* v. *McElwee*, Id. 208; *Railroad Co.* v. *Weaver*, 9 Lea, 38. It is likewise well settled that a common carrier is not bound in law to transport goods beyond its terminus, and that it may therefore lawfully stipulate that it shall not be liable for loss after the goods have passed beyond the limits of its own line and upon the line of another: Schouler, Bailm. § 603; Lawson, Cont. § 236; *Railroad Co.* v. *Brumley*, 5 Lea, 401; *Dillard* v. *Railroad Co.*, 2 Id. 288; *Railroad Co.* v. *Holloway*, 9 Baxt. 188; *Railroad Co.* v. *Campbell*, 7 Heisk. 257. But it is readily seen that this case is not controlled by either of those doctrines. It is not the case of a limitation of liability to the line of the contracting carrier, nor of an extension of responsibility beyond the limits of that line; on the contrary, it is the case of a carrier for the whole route, attempting to relieve itself from liability upon any part thereof, because it has no conveyance of its own, and is compelled to use those of others, in the performance of its contract of shipment. Declining to lend our assistance or approval to such an effort, we hold that the defendant, notwithstanding its stipulation, is responsible for the consequences of the negligence, if any, of the railroad companies which it employed in the transportation of the goods sued for, such companies being, to all intents and purposes, its servants or agents, as between it and the plaintiff. There is no positive proof that the loss resulted from the negligence of any one. But such proof is not necessary to entitle plaintiff to a recovery; for "when goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he was not responsible:" Lawson, Cont. § 245; Hutch. Carr. § 769; Schouler, Bailm. § 439; *Railroad Co.* v. *Holloway*, 9 Baxt. 188; *Dillard* v. *Railroad Co.*, 2 Lea, 296; *Transportation Co.* v. *Oil Co.*, 63 Pa. St. 14.

The defendant assigns as additional error, the action of the Court below in giving to the jury certain instructions and in re-

fusing certain requests for instructions with respect to what was necessary to constitute the bill of lading, a contract between the parties. Referring to the bill of lading and the stipulation therein, which we have already quoted and considered, his Honor, the trial judge, said to the jury: "It is not a contract between the parties unless you find that there is evidence establishing that plaintiffs agreed to that stipulation. Before the stipulation in the bill of lading would be binding on the plaintiffs, it would be necessary for the defendant to show that plaintiffs' attention had been called to it, and that they expressly or impliedly assented to it; the fact that they accepted the bill of lading from the defendant, kept possession of it without objection, and introduced it in evidence, would not be sufficient, in my opinion." This charge is in accord with the uniform holding of the Supreme Court of Illinois, which requires the carriers to show affirmatively that the restrictions of liability claimed by it were in fact known and assented to by the shippers: *Boscowitz* v. *Express Co.*, 93 Ill. 523; *Field* v. *Railroad Co.*, 71 Id. 458; *Express Co.* v. *Haynes*, 42 Id. 89; but it is contrary to the great weight of American and English decisions, which hold that the fair and honest acceptance of a bill of lading without dissent raises a presumption that all limitations contained therein were brought to the knowledge of the shipper, and agreed to by him: 3 Woods, Ry. Law, note 2, pp. 1577, 1578; Lawson, Cont. § 102; Hutch. Carr. § 239; Schouler, Bailm. §§ 464, 465; *Railroad* v. *Brumley*, 5 Lea, 404; *Dillard* v. *Railroad Co.*, 2 Id. 294. The requests for instructions were in substantial conformity to the rule as announced by this Court in the last two cases mentioned. This action of the Court in giving the jury improper instruction upon the one hand and in refusing to give proper instruction upon the other, would ordinarily be fatal, and afford ground for reversal; but it is not so in this case, because the error is immaterial. The matter in hand was the stipulation through which the defendant sought to protect itself against liability. It has already been seen that the Court was right in telling the jury that such stipulation, though contained in the contract, was invalid, because unreasonable and against public policy. Therefore any error with

reference to what was necessary to make it a contract, was clearly immaterial. Being immaterial, a reversal cannot be predicated upon it: *Myers* v. *Bank*, 3 Head, 331; *Redmond* v. *Bowles*, 5 Sneed, 547; *Patterson* v. *Head*, 1 Lea, 664.

Affirmed.

FOLKES, J., dissented.

The Power of Express Companies to Limit their Liability as Common Carriers.

The defendant in the principal case, the Merchants' Despatch Transportation Company, is practically a freight express company. Like an express company, it is an independent organization, owning its own cars, and contracting, on the one hand, with individuals to carry their property, and, on the other hand, with various common carriers for the transportation of the property it has so undertaken to carry: Hadley, R. R. Transportation, p. 80. Most fast-freight lines are merely an association or partnership of connecting carriers for the carriage of through freight, and have no real existence apart from the carriers of which the association is composed: Hadley, R. R. Transportation, pp. 88 and 89; *Block* v. *Despatch Co.*, 21 Am. & Eng. R. R. Cas. 1. The Merchants' Despatch Transportation Company is an exception. As above stated it has a separate, independent existence, distinct from that of the common carriers doing its transportation, and differs from an express company chiefly in the nature and amount of freight it transports. For the purpose of this note, then, the decision in the principal case may be treated precisely as if the defendant had been an express company. The case may be regarded as an authority that an express company cannot by special contract so limit its common carrier liability as to exempt itself from liability for loss or damage resulting from the negligence of the common carriers, which it engages to effect the transportation of goods which it has undertaken to carry, or resulting from the negligence of the servants of such common carriers.

This proposition of law must be taken as conclusively established by the authorities: *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174; *Christenson* v. *American Express Co.*, 15 Minn. 270; *Boscowitz* v. *Adams Express Co.*, 93 Ill. 523; *Muser* v. *American Express Co.*, U. S. Circ. Ct. S. Dist. N. Y. Jan. 24, 1880, 1 Fed. R. 382; *Cincinnati, etc. R. R. Co.* v. *Pontius*, 19 Ohio St. 221; *Galveston, etc. R. R. Co.* v. *Allison*, 12 Am. & Eng. R. R. Cas. 28. Inasmuch, however, as it was not established without dissent, and as the basis upon which it rests is not altogether clear, it has been thought desirable to examine the authorities upon the point in chronological order, with the view of arriving at a satisfactory explanation of the present state of the law.

The first case on the subject is *Hooper* v. *Wells, Fargo & Co.*, 27 Cal. 11; S. C. 5 AMERICAN LAW REGISTER, N. S. 16. In that case, the defendant, an express company, engaged to carry for the plaintiff, a package of gold dust worth $10,755, from Los Angeles to San Francisco, stipulating not to be liable except as forwarders, nor for loss or damage arising from railroad, ocean, or river navigation, etc. While the package was being conveyed in the

care of the defendants' messenger on a tugboat, on which it was to be carried to the steamer for San Francisco, the boiler of the tug exploded, owing to the carelessness of the engineer. The messenger was killed and the gold dust lost. The defendants did not own or control the tugboat. The Court held that the clause providing that the defendants should be liable only as forwarders, did not make the defendants forwarders, but merely fixed the degree or extent of the liability which they intended to assume. That the defendants were common carriers with a liability the same as that of a mere forwarder of goods. But forwarders of goods are liable for losses resulting from the negligence of their servants or agents. The engineer of the tug was the agent or servant of the defendants, and, therefore, the clause in question did not exonerate the defendants from the loss, since it was caused by the "negligence of the engineer" in permitting or causing the boiler to explode. This case was annotated by Judge REDFIELD, 5 AMERICAN LAW REGISTER, N. S. 30. He says: "The proposition that such a restrictive clause, to the extent that the express company are only to be responsible as 'forwarders,' could not be construed as exempting the carrier from responsibility for loss caused by the negligence of the employés on a steamboat, owned and controlled by other parties than the carrier, but ordinally used by him in his business of carrier as a means of transportation; and that in such case the employés of the steamboat are, in legal contemplation, the servants of the carrier, seems not susceptible of much question." Nevertheless, the case of *Hooper* v. *Wells, Fargo & Co.* was shortly after vehemently attacked in a leading article in the LAW REGISTER (5 AMERICAN LAW REGISTER, 449 and 513), the chief point of attack being the assumption on the part of the Court that the engineer of the tugboat was the defendants' servant or agent. The writer denied that the engineer was in any sense the servant or agent of the express company. He says that it might with equal propriety be urged that the driver of an omnibus, who runs over a child, is the servant of a passenger riding inside. The defendants expressly stipulated that their liability should be only that of a forwarder. Now a forwarder is only responsible for care in selecting suitable conveyances, and that, therefore, the defendants' responsibility, as far as the transportation by tugboat was concerned, was limited to selecting a suitable tugboat (and there was no evidence to show that the tugboat in question was not suitable), and that the defendants were entirely exempted from all liability for the negligence of the officers in operating the tug. The writer lays down the general proposition, that express companies may exempt themselves from liability for the negligence of employés of railroads and steamboats, which they hire to do their carrying for them, on the ground that such employés are not the employés of the express companies, and that, hence, the rule prohibiting a carrier from contracting for exemption from the consequences of the negligence of his employés, does not apply. He defends this proposition on the ground that the express carriers do not and cannot control the employés of the railroads or steamboats.

Another writer (5 AMERICAN LAW REGISTER, N. S. 648) goes so far as to hint that express companies are not common carriers, and should be exempted from liability for the negli-

gence of the employés of carriers they employ, without any special contract limiting liability, on the general principles of law, that a person is not liable for the negligence of the servant of one who contracts to do work for him.

The next case is that of *Christenson* v. *American Express Co.*, 15 Minn. 270. In that case, the plaintiff delivered two chests of tea to the defendants at New York City, which it contracted to carry to Mankato, Minn., stipulating that it should be liable only as forwarders, and not liable for the perils of transportation or navigation. While the goods were *en route*, in charge of one of the defendants' messengers, the steamboat on which they were being transported struck a snag, owing to the negligence of those in charge of the boat. The boat was sunk and the goods lost. The defendants neither owned nor controlled the boat. The Court held that though the defendants' common law liability was modified by the special stipulation, it was not modified far enough to exempt the defendant from responsibility for its own negligence or that of its agents employed by it in the transmission of the goods, and that the defendants were therefore liable for the loss of the goods, thereby assuming that the officers of the boat were the agents of the express company.

The next and leading case upon the subject is that of *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174. In that case, the defendant, the Adams Express Company, received a package of money from the Louisiana National Bank, New Orleans, to be transported to the Bank of Kentucky, Louisville, Ky. The defendant itself owned or controlled no means of transportation, but hired common carriers to do its transportation for it. While the package of money in question was being carried over the road of the Louisville and Nashville Company, the car was thrown from the track by the breaking of a trestle, caught fire, and the package of money was destroyed. The money was in possession of the messenger of the defendant at the time the accident took place. He was rendered insensible by the fall of the car, and so continued until after the money was destroyed. The bill of lading contained a clause stipulating that "the company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package or its contents, or of any portion thereof, occasioned by fire." The Court below charged the jury that under the above clause, the defendants would not be liable for the loss if resulting solely from the negligence of the railroad company or its servants, the defendants and its messenger being free from negligence. On appeal the Supreme Court held that this instruction was erroneous; that the clause in question did not provide an exemption broad enough to relieve the express company from loss arising through the negligence of the railroad companies or their employés; that the clause should not be construed as covering the case, losses by fire, caused by the negligence of the railroads or their servants. The Court also intimates that an express company cannot by special contract exonerate itself from liability in such cases. The Court thus deals with the objection that the servant of the railroad is not that of the express company, and that, therefore, the rule prohibiting common carriers from stipulating against liability for the negligence of their employés does not govern. "The foundation of the rule is, that it tends to the greater security of consignors, who always

deal with such carriers at a disadvantage. It tends to produce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriers more unreliable. This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant."

In *Boscowitz* v. *Adams Express Co.*, 93 Ill. 523 (1879), the facts were as follows: The plaintiff had expressed goods by the defendant company. The defendant had given them to a railroad company to transport and while in transit they were destroyed by fire in an accident which occurred. In the receipt given by the defendant was a printed clause exempting the company from liability to exceed $50. On the trial, evidence was offered, going to show that the fire by which the goods were destroyed was caused by telescoping of the cars, and that the telescoping might have been prevented, had the company had upon their cars a proper kind of platform. All this evidence was excluded. On appeal, it was held that the defendant was liable for the full value of the goods, if their loss was caused by the negligence of the railroad company, and that, therefore, the evidence excluded should have been admitted, as tending to show negligence on the part of the railroad company.

In *Muser* v. *American Express Company*, *supra* (1880), it was held that an express company could not, by special contract or stipulation in the express receipt, exonerate itself from liability for the destruction of the property caused by the negligence of the employés of a railroad company employed by the express company to transport the property.

The following authorities, although the carrier was not an express company, bear upon the subject under discussion :—

In the case of *Cincinnati, etc. R. R. Co.* v. *Pontius*, 19 Ohio St. 221, the Court state that where a common carrier makes an entire contract for the transportation of goods to a point beyond its own line, it cannot, by special contract, exempt itself from liability for loss or damage occasioned by the negligence of the connecting carrier or its servants or employés. In this case, the terminus of the defendants' road was Dayton: the goods were to be shipped to New York. The Court say: "It is quite clear, therefore, that if the company had made a contract to carry to Dayton only, and a similar proviso had been inserted against liability for loss happening on the company's own road, the proviso would have been void, at least as to any loss occasioned by negligence or default. Now, if the contract is to be regarded as an undertaking to carry to New York instead of Dayton, why should not the same rule of law apply? The same reasons of public policy seem to exist. The only essential difference is that in the latter case the distance covered by the undertaking is increased, and the number of the carrier's agents is multiplied. * * * The same rule of public policy, which denies the right of exemption from loss, arising from fault or negligence, and the same reasons supporting it,

apply equally to such cases as it does to contracts for carriage upon the carrier's own road:" *Galveston, etc. R. R. Co.* v. *Allison*, 12 Am. & Eng. R. R. Cas. 28.

In *Machu* v. *Railway Co.*, 2 Exch. 415, the facts were as follows: It was provided by Act of Parliament that common carriers should not be liable for the loss of parcels, unless their value were disclosed and an insurance price paid; it was provided, in the Act, however, "that nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ." The plaintiff delivered a parcel to the defendant railroad company to be carried to Bunhill-road, London. The railroad contracted with Chaplin & Home to carry goods for it in London. The plaintiff's parcel was stolen by Johnson, a porter employed by Chaplin & Home, who had been intrusted with the goods, to convey them to the place to which they were addressed. Although Chaplin & Home were independent contractors and Johnson was their servant and not that of the road, it was held that Johnson was a servant *in the employ of the defendant*, within the meaning of the Act, he being a servant engaged in doing, in behalf of the company, the work of transportation it had undertaken. The Court say that the Act is to be construed very liberally, and their construction of it would indeed appear to be liberal.

POLLOCK, C. B., says: "I am of opinion that this liability cannot be disposed of by the introduction of the term 'agent,' or by giving a principal name to the employment of any one employed to discharge the duty undertaken by the carrier. In the case which was put in the course of the argument, where a carrier confines himself to receiving goods and making contracts for their carriage and avails himself of a sub-contract to transfer to some one else the whole duty which he has undertaken to perform, I think that *all* the parties who come in under that subsequent contract, whether directly or by sub-contract, I think that *all* the parties actually employed in doing the work which the carrier undertook to do, either by himself or by his servants, are his servants within the meaning of the eighth section of the Act in question."

ROLFE, B., says, construing the part of the Act given above in quotation marks: "I think a very large construction ought to be given to these words; they must be taken to mean the book-keepers, porters, or other servants actually employed to do what the carrier has undertaken to do."

PLATT, B., says: "Any person employed by a carrier to perform the contract into which he enters, is a servant in the employ of the carrier, within the true meaning of the statute."

We have now examined all the authorities (so far as the writer knows) upon the subject under discussion. Several distinctions are to be noted. First, although it is generally stated in all of these authorities that the express company is responsible for the negligence of the servants of railroads or other carriers it employs, this point is actually involved in only three of them: *Hooper* v. *Wells, Fargo & Co.*, *Christenson* v. *Express Co.*, and *Muser* v. *Express Company*. In *Bank of Kentucky* v. *Adams Express Co.*, and *Boscowitz* v. *Express Co.*, the negligence was not on the part of servants or employés of the

road, but of the road itself; in the one case, in having an insufficient bridge, in the other, in not having proper platforms to its cars. The distinction is important, and for this reason. The railroads are undoubtedly to be regarded as agents of the express company in transporting property for it. Hence, in all jurisdictions where the rule prevails that a common carrier can not stipulate against the consequences of the negligence of his own servants or agents, the strict and literal terms of the rule would prevent an express company from exempting itself by stipulation from loss through the negligence of the railroads it contracts with. Not so, however, where the express company seeks to exempt itself from loss arising from the negligence of the employés or servants of the railroad. Here the servants or employés are those of the road, and not those of the express company, and hence the case does not fall within the strict provisions of the rule.

Another distinction to be observed is this. Some of the cases hold that express companies cannot exempt themselves from the consequences of the negligence of the railroads or their employés, while other cases merely hold that the given stipulation passed upon in the case was not strong enough to provide such exemption. All the cases which base the liability of the express company for negligence of employés of the railroad it employs upon the general rule that a common carrier cannot exempt himself by special contract, from liability for the negligence of his servants or agents, maintain that the servant of the railroad is also in some sense that of the express company as well. The criticism of this position in the leading article in THE LAW REGISTER seems entirely just. The servant of the railroad is not, in any sense, the servant of the express company, and the refusal to permit the express company to exempt itself from the consequences of his negligence, cannot reasonably be based on any assumption that he is.

Is not the true explanation this? That the same principle of public policy which prohibits a common carrier from stipulating for exemption from liability from loss or damage, arising in the carriage of goods, from the negligence of his servants or agents, demands that that rule should be extended, in the case of express carriers, so as to prohibit them from stipulating against the consequences of the negligence, not only of their own servants or agents, but of those of the railroad which they employ. This explanation is hinted at in the extract from the opinion of the Court in *Bank of Kentucky* v. *Adams Express Company*, quoted above. It is true, that the language of the judge in the English case of *Machu* v. *R. Co.* is rather against this explanation. But it seems that the Court there gave an unnatural and forced construction to a statute, to make it fit circumstances and conditions that had grown up since its enactment. With us, the question is not one of construing a statute, but of applying principles of law.

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